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IN THE

Supreme Court of the United States

Term. No. 337

ALEXANDER NORWOOD,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SUPREME COURT OF THE UNITED STATES:

Alexander Norwood, Joseph F. Tunstall, and John E. Smallwood, by their attorneys, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 16, 1954.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported. A copy of this opinion appears in the Appendix at p. 30. No opinion of the United States Court of Appeals for the Third Circuit was filed.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is not the decision of the United States Court of Appeals for the Third Circuit in this case, which is in conflict with the decisions of this Court and of other Courts of Appeals, incorrect in its holding that Title 28 U. S. C., Section 1404(a), is *not* subject to the restriction of *forum non conveniens?*

2. Is not the decision of the United States Court of Appeals for the Third Circuit in this case, which is in conflict with the decisions of this Court and of other Courts of Appeals, incorrect in its holding that mandamus will not lie to correct an order of a District Court transferring a case to another district?

STATUTES INVOLVED.

Act of June 25, 1948, C. 646, 62 Stat. 937, 28 U. S. C. A. 1404(a), which reads:

> "§1404. *Change of venue*
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> * * * * * * * * *

Act of April 22, 1908, C. 149 §6, 35 Stat. 66 as amended June 25, 1948, C. 646, §18, 62 Stat. 989, Title 45 U. S. C. A., §56, which reads:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the

residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE.

These are actions under the Federal Employers' Liability Act, Title 45 U. S. C., Section 51, et seq., to recover damages for serious injuries suffered by the plaintiffs as a result of the derailment of an Atlantic Coast Line train near Dillon, South Carolina. Suits were instituted on behalf of these plaintiffs in the United States District Court for the Eastern District of Pennsylvania which had jurisdiction by virtue of Title 45 U. S. C., Section 56. Defendant filed motions to dismiss, or, in the alternative, to transfer, under Title 28 U. S. C., Section 1404(a), to the United States District Court for the Eastern District of South Carolina, Florence Division. After argument had and affidavits filed, the Honorable William H. Kirkpatrick, on July 12, 1954, filed an opinion denying the motion to dismiss and granting the motion to transfer.

The accident eventuating in the District Court actions was the result of a derailment of a train in whose operation plaintiffs were not concerned. They were confined to, and treated in, various hospitals, and were treated by a number of different doctors. However, the greater number of hospitals in which they were confined and treated, and the greater number of treating physicians, are located either in the Eastern District of Pennsylvania or in Washington, D. C., the latter, of course, being much closer to the Eastern District of Pennsylvania than to Florence, South Carolina.

Petitioner Norwood resides in the Eastern District of Pennsylvania, where he brought suit (Chester, Pa.). Two of the petitioners (Smallwood and Tunstall) reside in Washington, D. C.

It is proposed to transfer their cases to Florence, South Carolina.

All of them are Negroes, who prima facie will fare better in Philadelphia than in Florence, South Carolina.

Your petitioners filed an application in the Court of Appeals for the Third Circuit on July 13, 1954, for a writ of mandamus or prohibition, or both, directed to the District Court Judge. This was denied on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. This petition is filed from the denial of the application for the writ of mandamus or prohibition, or both.

In granting the motion to transfer, the lower Court said:

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

Thus, admittedly, the District Court Judge would have refused the motion to transfer had he not been forced to the contrary by the decision of the Court of Appeals for the Third Circuit, in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952), where that Court said, at page 1011:

"In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

"[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

ARGUMENT.

1. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS ERRONEOUSLY INTERPRETED TITLE 28 U. S. C., SECTION 1404(a), AND SUCH INTERPRETATION IS IN CONFLICT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS AND THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

Admittedly, these cases would not have been transferred if the District Court Judge had been bound by the principles of *forum non conveniens* in deciding the motion to transfer

under Title 28 U. S. C., Section 1404(a). The portion of the opinion of the Honorable District Court Judge which points up the importance of this case, and the necessity of a review by Your Honorable Court, is:

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2nd 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

In other words, it is quite clear that the transfer of these cases would have been denied by the District Court Judge if the United States Court of Appeals for the Third Circuit had not held that Section 1404(a) was not subject to the restrictions of *forum non conveniens,* as it did in *All States Freight v. Modarelli,* 196 F. 2d 1010 (C. A. 3, 1953).

In that case, the Third Circuit said, at page 1011:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens,* as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it

> not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is equally clear that such interpretation by the Court of Appeals for the Third Circuit is in direct conflict with the interpretation of Section 1404(a) by all three other circuits that have considered the question.

These Courts of Appeals have held that Title 28 U. S. C., Section 1404(a) is subject to the limitation of *forum non conveniens.*

In *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (C. A. 2, 1950), Judge Frank said, at page 330:

> "*We think that, by* §1404(a), *Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens,* despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2nd 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis *these words found in Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, *still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'* Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered* as against the 'convenience' of the witnesses or what otherwise might be the balance

of 'convenience' as between 'the parties'." (Emphasis supplied.)

In *Nicol v. Koscinski*, 188 F. 2d 537 (C. A. 6th, 1951), the Court of Appeals for the 6th Circuit decided that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said at p. 537:

> "It is clear that whether the order stands or is set aside, one of the litigants will be inconvenienced, and it became the duty of the district judge to balance inconveniences and to determine upon which litigant the greater hardship would rest, if he granted change of venue, and that determination was subject to the rule that *unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed.*" (Emphasis supplied.)

In *Wiren v. Laws*, 194 F. 2d 873 (U. S. C. A. District of Columbia, 1951), the Circuit Court again applied the restriction of *forum non conveniens* to a determination of the question of transfer under Section 1404(a). The court said at p. 874:

> "Those criteria, applied to the §1404(a) situation, have been set out by Judge Frank in Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329, 330. After pointing out that the question is 'whether the judge abused his discretion,' he continues: '* * * by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, [93 L. Ed. 1207] 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, [93 L. Ed.] 1226, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508,

67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. 'Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'."

Indeed, the Third Circuit itself recognized that many of the District Courts and Courts of Appeals were applying the limitations of *forum non conveniens* to Section 1404(a), and that it was in conflict with these other courts. It said in *All States Freight v. Modarelli*, 196 F. 2d 1010, at p. 1011:

> "In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

and at p. 1012:

> "* * * *We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute.*" (Emphasis supplied.)

The same District Court Judge as is involved in these cases also decided the case of *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761 (U. S. D. C. E. D. Pa., 1949). He there held that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said (pp. 763-764):

> "It is my opinion that, whatever inconvenience may result to the defendant from trying these cases in Philadelphia, it is not so great as to allow the Court, under the well established limitations of the doctrine forum

non conveniens, to transfer the cases to Pittsburgh; nor do I think that the interests of justice imperatively require it if balanced against the importance of allowing the plaintiff freedom of choice among forums of unquestioned venue. After all, Section 6 of the Federal Employers' Liability Act was designed to give the injured employee a wide choice of forum in which to bring his action. It has not been repealed and the underlying policy remains and should be carried out whenever possible unless serious inconvenience or injustice to the defendant will result. *The view contended for by the defendant would come close to making Section 1404(a) a venue statute, under which the court, after striking a nice balance of conveniences, would be bound to limit the plaintiff to a single jurisdiction.* If that had been the purpose, the statute would have directed the courts to make transfers to the most convenient jurisdiction—a very different question from that involved in the doctrine of forum non conveniens.

"These, I think, are the principles which must guide my discretion. I have very little doubt that it was the intent of Congress to do more than permit the transfer of cases which otherwise, under the doctrine forum non conveniens, would have been dismissed *and that it was not intended to abolish or extend the boundaries within which the Court's discretion to refuse jurisdiction could be exercised.* In Ex parte Collett, supra, the Court pointed out that when Section 1404(a) first appeared in the Second Draft of the Code adopted May, 1945, it was accompanied by a reviser's note which recited that '"Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of forum non conveniens" * * * And the reviser's notes were before the Congress at every subsequent legislative step.' The Court said, 'From the start, §1404(a) remained the

same, and the reference in the note to a Federal Employer's Liability Act case as showing the need for permitting the application of forum non conveniens remained unchanged.' In United States v. National City Lines, Inc., 337 U. S. 78, 69 S. Ct. 955, 956, 959, an opinion handed down on the same day as the Collett case, supra, the Court referred to 'Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, and Kilpatrick v. Texas & Pacific R. Co., 337 U. S. 75, 69 S. Ct. 953, 959, in which we held that actions under the Federal Employers' Liability Act, 45 U. S. C. A. §51, et seq., were now subject to the doctrine of forum non conveniens.'

Besides, although it is quite true that the new Judicial Code was a revision as well as a codification and that it made some important changes in the law, it is also true that it was not thought to be desirable nor intended to make sweeping changes. In committing to the court's discretion to transfer cases, it is more in harmony with the expressed purpose of the framers of the Code to have that discretion controlled by well recognized principles than to unsettle the whole law on the subject and leave it wide open for the courts to evolve entirely new rules." (Emphasis supplied.)

The decision by the Third Circuit in *All States Freight Co. v. Modarelli*, supra, is without foundation in law, either in previously decided cases by your Honorable Court, or in the legislative history of Title 28 U. S. C., Section 1404(a). Moreover, your Honorable Court has often clearly indicated that Section 1404(a) is nothing more than an application of the doctrine of *forum non conveniens*.

In *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), your Honorable Court had before it the question of whether Section 1404(a) was applicable to Federal Employers' Liability cases. Chief Justice Vinson, in stating the question that was then before the Court, said, at page 56 (69 S. Ct., p. 945):

> "In this case we must decide whether the venue provisions of the Judicial Code *render applicable the doctrine of forum non conveniens to actions under the Federal Employers' Liability Act.*" (Emphasis supplied.)

This Court in the same case said at pages 57 and 58 (69 S. Ct., p. 946):

> "The reviser's notes, which accompany each section of the Code, here read as follows: '*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.' The precise issue before us is whether, despite these expressions, the law remains unchanged. Petitioner so contends." (Emphasis supplied.)

It is therefore apparent that the revisers of the Judicial Code clearly intended to make the doctrine of *forum non conveniens* applicable and nothing more. The whole tone and tenor of the opinion of *Ex parte Collett* is one of a discussion of *forum non conveniens*, and does not, in any fashion, support the interpretation of Section 1404(a) which the Third Circuit has now decided to be the correct one. This Court said, in 337 U. S., at pages 60 and 61 (69 S. Ct. 947):

> "The inapplicability of *forum non conveniens* to Liability Act suits derives from the Kepner decision. And there this Court expressly stated that 'If it is deemed

unjust, the remedy is legislative * * *.' 314 U. S. at page 54, 62 S. Ct. at page 10 86 L. Ed. 28. That opinion discusses §6 of the Liat ity Act, to be sure, but this Court did not and could x suggest that the legislative answer had necessarily t be addressed to that section. Since the words selecte by Congress for §6 denote nothing, one way or the other, respecting *forum non conveniens*, there was no ccasion to repeal that section, expressly or impliedly; Congress chose to remove its judicial gloss via anothe statute. Discussion of the law of implied repeal is therefore, irrelevant."

and at page 65 (69 S. Ct., pag 949):

"His argument is obviously based not on the actual legislative history of §1404(a), but on necessarily vague speculation as to what Co gress might have done had it fully realized that *forum non conveniens was henceforth to be applicable in Federal Employers' Liability Act suits.*" (Emphasis su; plied.)

and at page 68 (69 S. Ct., page 951):

"It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that *recognition should be given the doctrine of forum non conveniens.* * * *" (Emphasis supplied.)

and, at page 71 (69 S. Ct., page 952):

"From the start, Section 1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged."

Furthermore, as recently as April of 1953, your Honorable Court, in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379,

73 S. Ct. 749 (1953), reiterated its holding in *Ex Parte Collett*, at page 383 (73 S. Ct., page 751):

> "We have heretofore held that §1404(a) makes *the doctrine of forum non conveniens applicable to Federal Employers' Liability Act cases* brought in federal courts and provides for the transfer of such actions to a more convenient forum. Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207." (Emphasis supplied.)

In the same opinion, this Court quoted, in Footnote 10, page 385, the Reviser's Notes, which said:

> "Subsection (a) was drafted *in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper." (Emphasis supplied.)

Thus, this Court has at all times regarded Section 1404(a) as synonymous with the doctrine of *forum non conveniens*, and, therefore, subject to the same restrictions as are found under the doctrine of *forum non conveniens*.

It is undoubtedly true that this Court, the Second Circuit, the Sixth Circuit, and the Court of Appeals for the District of Columbia have correctly interpreted §1404(a) as subject to the same limitations as are found in the doctrine of *forum non conveniens*. Whatever may be said of other types of actions, employees bringing suit under the Federal Employers' Liability Act were given a "substantial right" to select their forum by Section 6 of the Federal Employers' Liability Act. Indeed, your Honorable Court, in *Boyd vs. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held that the venue rights afforded by Section 6 of the Federal Employers' Liability Act were so strong that they could not be contracted away and said (p. 266) (70 S. Ct. 28):

> "And nothing in Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, affects the initial choice of venue afforded

Liability Act plaintiffs. We state expressly that the section of the Judicial Code there involved, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a), *'does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district.* An action may still be brought in any court, state or federal, in which it might have been brought previously.' 337 U. S. at page 60, 69 S. Ct. at page 947.

"The right to select the forum granted in Section 6 is a *substantial right.*"

The interpretation which the Third Circuit has given Section 1404(a) not only limits and modifies the right granted in Section 6 of the Federal Employers' Liability Act, but destroys the "substantial right" given to such plaintiffs by such Section. The decision in *All States Freight Co. v. Modarelli,* supra, is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor. Judge Frank, in *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (C. A. 2, 1950), said, at page 330:

"* * * We think that, by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against*

the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'." (Emphasis supplied.)

Compare, also, the language of Judge Learned Hand, in the same case, where he said, at p. 332:

"I wish to put my vote solely upon the ground that §15 of Title 15 U. S. C. A. gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums. If I thought that we had before us an unweighted choice between New York and Detroit, based upon that consideration, I should choose Detroit; indeed, I should think it a clear abuse of discretion to hold otherwise. *However, as I understand it, the privilege granted by §15 still counts in the scale;* a defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient." (Emphasis supplied.)

It is this language which the Third Circuit rejects in the case of *All States Freight Co. vs. Modarelli,* supra. If the "plaintiff's privilege, conferred by statute, of choosing the forum he selected" is rejected, as "a factor to be considered as against the convenience of witnesses or what otherwise might be the balance of convenience as between the parties", there is nothing left of the plaintiff's venue privileges under Section 6 of the Federal Employers' Liability Act.

The decision in *All States Freight Co. vs. Modarelli,* supra, compels district court judges to choose *the most* convenient forum and transfer, upon motion, the case to that forum. Since there can be only one *most* convenient forum, this interpretation undoubtedly destroys all rights given to plaintiffs by Section 6 of the Federal Employers' Liability Act,[1]

[1] If it be thought that the forum for the trial of a case is of little practical importance in the administration of justice, it need only be pointed out that the three seriously injured petitioners involved in this case are negroes, who must, if the transfer is granted, try their cases before a jury in South Carolina.

and forces them to litigate their cause, not in the "district of the residence of the defendant in which the cause of action arose, or in which the defendant is doing business"—the words of Section 6—but in only *one place: the* most convenient forum. As examples of this interpretation of the effect of the *Modarelli* decision, we point to *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (U. S. D. C., D. Del., 1954); *General Felt Products Co. v. Allen Industries, Inc.*, 120 F. Supp. 491 (U. S. D. C., D. Del., 1954), where Judge Leahy, bound by the *Modarelli* decision, considered numerous forums and chose *the* most convenient one. Such interpretation is directly contrary to your Honorable Court's decisions in *Ex Parte Collett*, supra; *Boyd v. Grand Trunk Western R. Co.*, supra; and *Pope v. Atlantic Coast Line R. Co.*, supra. In *Pope v. Atlantic Coast Line*, supra, this Court said, at pages 386, 387 (73 S. Ct. at page 753):

> "Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted §1404(a) *refused to enact a bill which would have amended §6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.*
>
> "This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under §6 and 'harass' their employers in distant forums without restrictions. They insisted that these abuses be curtailed.
>
> "These arguments prevailed in the House which

passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and §6 of the Federal Employers' Liability Act was left just as this Court had construed it."

Indeed, the former Governor of California and now Chief Justice of this Court spoke regarding an effort of the California Legislature, in 1953, to incorporate a doctrine of *forum non conveniens* into the law of that state. (Senate Bill No. 789.) In vetoing such bill, he said:

> " 'If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose *its national uniformity and could at least substantially weaken the purposes for which the act was originally designated.* I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple act of Congress.' "

If Section 6 is to continue to have the vitality attributed to it by your Honorable Court, in consistent and unwavering decisions, the interpretations of Section 1404(a) by the Third Circuit in *All States Freight v. Modarelli*, supra, cannot be allowed to stand.

There can be no doubt of the importance of this case. In *Ex Parte Collett*, supra, your Honorable Court said, at page 57 (69 S. Ct., page 945):

> "Since that issue seemed of importance in the administration of justice, we assigned the case for hearing on the motion."

and footnoted that statement as follows (footnote 4):

> "At least five district court decisions dealing with the relationship of §1404(a) to FELA suits have been reported. Four have held that the section is applicable. Hayes v. Chicago, R. I. & P. R. Co. (and seven other cases), D. C. 1948, 79 F. Supp. 821; White v. Thompson, D. C. 1948, 80 F. Supp. 411; Nunn v. Chicago, St. P. & P. R. Co., D. C. 1948, 80 F. Supp. 745; Scott v. New York Central R. Co., D. C. 1948, 81 F. Supp. 815; cf. Brainard v. Atcheson, T. & S. F. R. Co., D. C. 1948, 81 F. Supp. 211; Perry v. Atcheson, T. & S. F. R. Co., D. C. 1948, 82 F. Supp. 912 (in both, motion to transfer denied, in exercise of 'discretionary powers'); Chaffin v. Chesapeake & O. R. Co., D. C. 1948, 80 F. Supp. 957; Richer v. Chicago, R. I. & P. R. Co., D. C. 1948, 80 F. Supp. 971. One reported decision has held that the Code section is inapplicable to such suits. Pascarella v. New York Central R. Co., D. C. 1948, 81 F. Supp. 95."

Using this as a guide post for the determination of the importance of the issue, we find that practically every volume of the Federal Supplement contains at least one, and usually two or three, cases involving the application of Section 1404(a). Almost without exception, these cases quote and cite with approval the case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1947). Our research discloses that this leading case on the principles of *forum non conveniens* has been relied upon in deciding motions under Section 1404(a) no less than twenty times since Volume 97 of the Federal Supplement was published.

The following cases have applied the restrictions of the doctrine of *forum non conveniens* to questions arising under Section 1404(a):

> *Rhodes v. Barnett*, 117 F. Supp. 312 (U. S. D. C. S. D. N. Y. 1953);
>
> *Lehn & Fink Products Corp. v. Milner Products Co.*, 117 F. Supp. 320 (U. S. D. C. S. D. N. Y. 1953);

United States v. Switzer Bros., 115 F. Supp. 49 (U. S. D. C. N. D. Calif., S. D. 1953);
Duffy v. United States, 114 F. Supp. 881 (U. S. D. C. S. D. N. Y. 1953);
Faucette v. Lykes Bros. S. S. Co., 110 F. Supp. 287 (U. S. D. C. S. D. N. Y. 1953);
Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (U. S. D. C. S. D. N. Y. 1953);
Wheeler v. Societe Nationale Des Chemins, Etc., 108 F. Supp. 652 (U. S. D. C. S. D. N. Y. 1952);
Ronson Art Metal Works v. Brown & Bigelow, 105 F. Supp. 169 (U. S. D. C. S. D. N. Y. 1952);
Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422 (U. S. D. C. S. D. N. Y. 1952);
Lynch v. Luckenbach S. S. Co., In., 104 F. Supp. 494 (U. S. D. C. S. D. N. Y. 1952);
McDaniel v. Drotman, 103 F. Supp. 643 (U. S. D. C. W. D. Ky. 1952);
Oritz v. Union Oil Co. of California, 102 F. Supp. 492 (U. S. D. C. S. D. N. Y. 1952);
Reade Shirts v. Commonwealth Ins. Co. of New York, 102 F. Supp. 941 (U. S. D. C. S. D. N. Y. 1952);
Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (U. S. D. C. S. D. N. Y. 1951);
Nicol v. J. C. Penny Co., 97 F. Supp. 83 (U. S. D. C. E. D. Mich. 1951);
Mazinski v. Dight, 99 F. Supp. 192 (U. S. D. C. W. D. Pa. 1951);
Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co., 99 F. Supp. 503 (U. S. D. C. D. Del. 1951);
Goodman v. Southern Ry. Co., 99 F. Supp. 852 (U. S. D. C. S. D. N. Y. 1951).

In fact, we have been able to find only two District Court decisions which reject the application of the principles of

Gulf Oil Corp. v. Gilbert, supra, and these are two decisions by a United States District Court within the Third Circuit. They are in the United States District Court for Delaware after the decision in *All States Freight v. Modarelli*, supra. They are *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (1954), and *General Felt Products Co. v. Allen Industries*, 120 F. Supp. 491 (1954).

Not only have the District Court Judges used the principles and applied the limitations of *forum non conveniens*, but at least three Justices of your Honorable Court have directly recognized that Section 1404(a) is a *forum non conveniens* statute, and that the principles of *Gulf Oil Corp. v. Gilbert*, supra, are applicable. In *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856 (1953), in a dissenting opinion, Justice Jackson, with whom Justices Black and Minton joined, said, at page 522 (S. Ct. p. 860):

> "28 U. S. C. §1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. The purpose was to adopt for federal courts the principles of *forum non conveniens*. Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944 L. Ed. 1207. These are broad and imprecise and involve such considerations as the state of the court's docket. Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055."

The majority opinion did not discuss this matter nor disagree in any respect with this statement by the dissenters.

To allow the decision of *All States Freight v. Modarelli*, supra, to stand unreviewed by this Court would leave the important Third Circuit standing alone in its interpretation of Section 1404(a), and would compel the District Court Judges in that Circuit to decide questions under Section 1404(a) on bases different from the entire remainder of the United States Courts.

For these reasons, certiorari should be allowed, and the decisions of the Court of Appeals for the Third Circuit

should be conformed to the decisions of other circuits, the intention of Congress in enacting Section 1404(a), and the decisions of this Court interpreting it.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEALS HOLDING THAT MANDAMUS WILL LIE TO CORRECT AN ORDER OF THE DISTRICT COURT, EITHER DENYING OR GRANTING TRANSFER OF THE CASE TO ANOTHER DISTRICT UNDER TITLE 28 U. S. C., SECTION 1404(a).

The question here raised is one of extreme importance to the administration of justice. A holding that mandamus will not lie to correct an order of the District Court, either transferring or refusing to transfer under Title 28 U. S. C., Section 1404(a), deprives the losing party of any effective right to correct a decision of the District Court, no matter how egregious its error may be. The frequency of cases involving the application of Section 1404(a) has already been adverted to in a previous portion of this brief.[2]

Five Courts of Appeals have held that mandamus will lie to correct such orders.

Ford Motor Co. v. Ryan, 182 F. 2d 329 (C. A. 2, 1950), certiorari denied 340 U. S. 953, 71 S. Ct. 572;

Atlantic Coast Line R. Co. v. Davis, 185 F. 2d 766 (C. A. 5, 1950);

Chicago R. I. & P. R. Co. v. Igoe, 212 F. 2d 378 (C. A. 7, 1954);

Shapiro v. Bonanza Hotel Co., 185 F. 2d 777 (C. A. 9, 1950);

Wiren v. Laws, 194 F. 2d 873 (Dist. of Columbia, 1951).

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[2] Pages 19-22, supra.

Two Courts of Appeals have held that mandamus does not lie to correct a Section 1404(a) order.

> *Carr v. Donohoe*, 301 F. 2d 426 (C. A. 8, 1953);
> *All States Freight Co. v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952).

Thus, there is a demonstrable conflict among the circuits on the important question here involved. The factors arising in favor of a decision that mandamus does lie are:

(a) The losing party in the District Court has no other remedy available.

It is well established, without exception, that an order granting or denying transfer is not appealable. *Ford Motor Co. v. Ryan*, supra; *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4, 1949). However, some courts have treated appeals as petitions for mandamus in cases of this sort. *Ford Motor Co. v. Ryan*, supra; *Shapiro v. Bonanza Hotel Co.*, 185 F. 2d 777 (C. A. 9, 1950). Thus, without the right to have a review of the District Court's decision, the losing party is forced to go to or stay in the forum where he does not desire to try his case. Of course, after the trial of the case, upon an adverse ruling, the party has the right to raise the question of transfer (or non-transfer) in the Court of Appeals in which he now finds himself. However, it needs no citation of authority to demonstrate the practical situation of a losing party without any possible re-dress. For in this instance the losing party can never show any prejudice to the trial of his case because of the erroneous ruling on the transfer motion.

This reason for holding that a petition for mandamus would lie was given by Judge Frank in *Ford Motor Co. v. Ryan*, supra, where he said p. 330:

> "Judge Swan thinks we have no power to grant a writ of mandamus. Judge Hand and I think this the

kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

It was also relied upon in *Chicago R. I. & P. R. Co. v. Igoe,* 212 F. 2d 378 (C. A. 7, 1954), where that Court said, p. 381:

"While a ruling on a motion under Section 1404(a) to transfer is not an appealable order, Ford Motor Co. v. Ryan, supra; Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360, *it is the type of order which may, absent the power of this court to correct it in any case, give rise to judicially sanctioned irreparable procedural injury.*" (Emphasis supplied.)

In addition, should the losing party happen to be one against whom an erroneous transfer order had been granted, it is at least doubtful as to whether or not the Court of Appeals for the district in which he is forced to try his case has the power to return it to the original forum.

Atlantic Coast Line R. Co. v. Davis, 185 F. 2d 770 (C. A. 5, 1950).

(b) Your Honorable Court has impliedly recognized the power of the Courts of Appeals to grant writs for man-

damus in order to review questions arising in the interpretation of §1404(a).

> *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949); *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75, 69 S. Ct. 953 (1949); and *United States v. National City Lines*, 337 U. S. 78, 69 S. Ct. 955 (1949) were the first cases interpreting Section 1404(a). At least two of the reviews in those cases were by a petition for mandamus. In *Ex Parte Collett* the Court said, p. 57 (S. Ct., p. 945):
>
> "Petitioner then filed directly in this Court a 'motion for leave to file petition for order to show cause why writs of mandamus [against the court below] and prohibition [against the Kentucky District Court] should not issue, and petition for same'." * * * "Since that issue seemed of importance in the administration of justice, we assign the case for hearing on the motion."
>
> In *Kilpatrick v. Texas & P. Ry. Co.*, supra, this Court said, p. 77 (S. Ct., p. 955):
>
> "To nullify this order, petitioner moved this Court for leave to file a petition for a writ of certiorari or a writ of mandamus or any appropriate relief. We assigned the case for hearing on the motion for leave to file."

(c) In cases such as these arising under the Federal Employers' Liability Act, the employee's right to choice of venue could be arbitrarily and erroneously destroyed by a district court without any right of redress.

> We have already pointed out that if it be held that mandamus does not lie to correct an order of the district court granting a transfer, all persons so aggrieved have no effective remedy.
>
> With respect to individuals covered by the Federal Employers' Liability Act, such as these petitioners, a special venue statute, Section 6 of the Federal Em-

ployers' Liability Act, gave them a substantial right to select the forum in which they wish the case to be tried.

In *Boyd v. Grand Trunk Western R. Co.*, 70 S. Ct. 26, 338 U. S. 263 (1949), this Court said, at page :

"The right to select the forum granted in §6 is a *substantial right.*"

Nothing remains of this substantial right if a District Court Judge may with impunity transfer a case and if the plaintiff has no right to a mandamus action to correct such action. The action of the District Court Judge can be arbitrary and capricious. He can refuse to consider the factors outlined in Title 28, U. S. C. 1404(a) and the plaintiff is left without any effective remedy. Indeed, important questions arising in the administration of Title 28, U. S. C. 1404(a) can never be decided by the federal appellate courts if such situation is allowed to exist.

Most especially is the holding that mandamus will not lie an interference with the substantial right granted in Section 6 when such holding is coupled with the decision in *All States Freight Co. v. Modarelli,* supra, to the effect that the plaintiff's choice of forum is of no moment, and that this and the other factors of *forum non conveniens* do not apply when interpreting Title 28 U. S. C. 1404(a).

CONCLUSION.

Section 6 of the Federal Employers' Liability Act was originally written by the Congress of the United States, and broadened at its subsequent sessions to its present all-inclusive status. We are certain that the Congress did not write this section of the Act for naught. It must have done so only because it was aware of the need to provide injured railroad employees with more than one forum in which to try their cases. Indeed, Congress recognized that

railroad employees must be allowed to try their cases at considerable distances both from their homes or from the locale where they suffered their injuries and therefore provided this multiplicity of venue. The statute was written for the benefit of the employees—not for the benefit of the carrier. Congress has stoutly resisted efforts made at virtually every session since then to undermine Section 6. It has sustained its position, notwithstanding the organized opposition from various directions.

In the same session of Congress in which Section 1404(a) became enacted in law in Title 28 of the Judicial Code, Congress refused to adopt the Jennings Bill, which attempted to destroy the venue rights of Section 6. To allow, now, judicial destruction of a right legislatively created is to violate basic constitutional principles of law. It is to allow the judiciary to become the law-making body. It is to allow the achievement by indirection that which could not be achieved by direct action. It is to allow a subtle new solvent to dissolve, and, literally, to destroy, a basic, vital, important right of injured railroad employees. And this, without any right to the injured party to secure a correction of the District Court's decision by mandamus.

Whatever may ultimately be the course of other forms of litigation under Section 1404(a), we respectfully submit that this Section cannot have the effect of completely destroying special venue rights when created by Congress for special classes of persons. When special venue privileges were granted to railroaders, seamen and others, those privileges were granted intentionally. Only the grantor has the power to withdraw those rights.

Thus, this Court should grant certiorari to review the two questions here involved, which are extremely important in the administration of justice, and both of which have been decided differently by the Courts of Appeals.

Title 28, U. S. C. 1404(a) has possible application to every action filed in the Federal Courts. Its application, and the review of decisions by the District Court judges under such

section requires clarification if the administration of it is to be uniform, orderly, and fair to all parties.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES DISTRICT COURT.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed July 12, 1954.)

ALEXANDER NORWOOD v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 15810.
JOSEPH F. TUNSTALL v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 16174.
JOHN E. SMALLWOOD v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 16282.

SUR MOTIONS TO DISMISS OR TRANSFER.

Before: KIRKPATRICK, Ch. J.

THE MOTION TO DISMISS.

The defendant's activities in this District as disclosed by the affidavits are exactly the same as those in Robinson v. Atlantic Coast Line R. R. Co., Civil Action No. 13711, 1953 (in which I held this defendant was not subject to venue jurisdiction in the Eastern District of Pennsylvania), but the two cases are readily distinguishable. The Robinson case was a diversity case and, following the reasoning of Partin v. Michaels Art Bronze Co., 202 F. 2d 541, I held that inasmuch as the Pennsylvania Courts did not regard this corporation as subject to their jurisdiction (Law v. Atlantic Coast Line R. R. Co., 367 Pa. 170), it could not be sued in a diversity action in a federal court sitting in Pennsylvania. This case arises under the Federal Employer's Liability Act, and whether the defendant is subject to process here depends entirely upon whether it is doing business here, as that term is defined by the federal courts.

It is clear that federal courts, applying that Act, require less by way of business activities within the district to constitute doing business than the Pennsylvania court did in the Law case. As Judge Grim pointed out in Moore v. Atlantic Coast Line R. Co., 98 F. Supp. 375, 380, "Jurisdiction has been regularly sustained in 'solicitation plus' cases, that is, cases where foreign railroad corporations have engaged in business activities additional to the 'mere solicitation' of interstate business." In the present case I am of the opinion that the activities of the defendant in connection with its dining car service, fully discussed in the Law case, supplied the "plus" and I, therefore, hold that the defendant is subject to venue jurisdiction in this district.

The motions to dismiss are, therefore, denied.

THE MOTION TO TRANSFER.

It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a), is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.

The plaintiffs are all dining car employees of the defendant and were injured as a result of the derailment of one of the defendant's trains near Dillon, S. C.

The proposed witnesses whose names have been supplied in affidavits by both sides fall into two classes—those who will be called in connection with the issue of liability, and medical witnesses whose testimony will have to do with the nature, extent and probable duration of the plaintiffs' injuries and disabilities.

As to the liability witnesses, the plaintiffs' argument against the transfer seems to proceed on the theory, offered in an affidavit filed by the plaintiffs' attorney, that "there can be little question of liability, and witnesses for the defendant on the liability question are not necessary." Of course, if this were so there would be very little reason to order the transfer, in view of the plaintiffs' choice of forum. However, the defendant asserts that it intends to contest this issue vigorouly and lists some 24 fact witnesses whom, it says, will have to be called upon the point. From the summaries of what these witnesses are expected to testify

to and from a consideration of the kind of defense testimony needed to disprove negligence in derailment cases, I am satisfied that a good many, if not all, of the witnesses will have to be brought to Philadelphia at considerable expense. I certainly cannot at this point decide, as the plaintiffs want me to, that the defendant has no case and, therefore, will not need any witnesses.

The plaintiffs have listed some 48 passengers as possible witnesses but do not say how many they propose to call or what any of them can testify to other than the speed of the train, and it is difficult to see how more than two or three would be necessary.

On the medical side, the defendant proposes to call about a dozen doctors and hospital employees who have knowledge of the condition of the plaintiffs when they were treated at hospitals in South Carolina immediately after the accident. I am quite sure that very few of these will be needed, particularly in view of the fact that the plaintiffs have agreed to stipulate as to the authenticity of the hospital records.

There are, of course, other considerations. On the one hand, I have not overlooked the weight to be given to the plaintiffs' choice of a forum. On the other hand, the condition of the court calendar makes it fairly certain that the cases cannot be tried in this district for at least two years.

Smallwood and Tunstall are residents of Washington, D. C. Since their removal from the South Carolina hospital they have been treated and observed by physicians in Washington and Philadelphia. The Washington doctors, in any case, will have to leave Washington to testify in person.

Norwood is the only one of the plaintiffs whose home is in this district. The heavy balance of convenience in favor of the defendant in connection with the liability witnesses applies to him equally with the others but, on the face of it, he has a stronger case than the others with regard to the medical witnesses. It appears from an affidavit filed by his

attorney that he has been treated by two physicians in Philadelphia and two in Chester (Dr. Farrell, also listed, is a radiologist). It also appears that he has been confined in two hospitals in this district and that he has undergone an operation in one of them, from which he is now recuperating. It does not appear how long he remained under medical care in the hospital in South Carolina nor when he returned to Philadelphia and began treatment with the doctors listed. It is, however, impossible to accept at its face value his contention that the difficulty and expense of getting these witnesses to trial would be such a burden as to make it grossly unjust to him to try the case at a point distant from Philadelphia, in view of the fact that he first selected Chicago as an appropriate and convenient forum. In August, 1953, some three months after the accident, he began a suit against this defendant in the state court there and, although he instituted the present action on September 21, 1953, he maintained the Chicago suit until December 4, 1953.

The motions to transfer will be granted.

Appropriate orders may be submitted.